Supreme Court, U.S.
FILED
DEC 15 2003
OFFICE OF THE CLERK

No. 03-107

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

BILLY JO LARA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF LEWIS COUNTY, IDAHO, MILLE LACS COUNTY, MINNESOTA, AND THURSTON COUNTY, NEBRASKA, *AMICI CURIAE*, IN SUPPORT OF RESPONDENT IN PART

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December 15, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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INTEREST OF *AMICI CURIAE*

The Brief of Lewis County, Idaho, Mille Lacs County, Minnesota, and Thurston County, Nebraska, *Amici Curiae*, in Support of Respondent in Part is submitted pursuant to Sup. Ct. R. 37(4). The interest that prompts the filing of this Brief can be simply stated. Each county contains a substantial amount of land that Indian tribes are now claiming to be within the limits of Indian reservations. For the most part, these lands are owned and populated by non-Indians. Until recently, the jurisdictional history was clear. No one maintained that the original reservations still existed.

Today, armed with tens of millions of dollars in casino profits, Indian tribes are challenging the non-reservation status of these areas and other areas throughout the United States. As a result, any jurisdictional argument that departs from the fundamental principles noted in the decisions of this Court in *Oliphant v. Suquamish Indian Tribe, et al.*, 435 U.S. 191 (1978) and *Duro v. Reina*, 495 U.S. 676 (1990), is of substantial concern to *Amici*. The arguments of the United States in this case are clearly inconsistent with the analysis in *Oliphant* and *Duro*.

1. Lewis County, Idaho. Lewis County, Idaho, is located in north central Idaho. Its geographic boundaries include land which was within the Nez Perce Reservation existing prior to 1894. Today, the original Nez Perce Reservation is a rural area primarily owned and populated by non-Indians. Approximately ninety percent (90%) of the land is owned by non-Indians, and approximately ninety percent (90%) of the population is also non-Indian.

Early on, state and federal cases, including the path marking decision of this Court in *Dick v. United States*, 208 U.S. 340 (1908), were premised upon Nez Perce Reservation disestablishment. However, recent assertions of tribal jurisdiction over non-members and/or claims regarding the lack of state jurisdiction over tribal members have ignored this precedent and caused the issue to surface in the State of Idaho.

In state court, the status of the Nez Perce Reservation is at issue in *In re Snake River Basin Adjudication*, Case No. 39576 (5th Jud. Dist. County of Twin Falls), *appeal docketed*, Nos. 26042 and 26128 (Idaho Nov. 29, 1999). The lower court in the case concluded that the Nez Perce Reservation had been disestablished. *In re SRBA*, Case No. 39576 (Jan. 21, 2000). In federal court, the court of appeals rejected the evidence of this disestablishment, as well as the jurisdictional

history of the area. *United States v. Webb*, 219 F.3d 1127 (9th Cir. 2000), *cert. denied*, 531 U.S. 1200 (2001).

2. Mille Lacs County, Minnesota. Mille Lacs County is a rural county on the south shore of beautiful Lake Mille Lacs in north central Minnesota. The County is approximately twenty (20) miles by fifty (50) miles square. It has a population of approximately 25,000 residents.

In 1855 the Mille Lacs Band shared a 61,000 acre reservation in the northern part of the county that bordered on Lake Mille Lacs. The reservation was subsequently ceded to the United States. Today, the land in the area is at least eighty percent (80%) owned by non-Indians and eighty percent (80%) populated by non-Indians.

In the early 1900's the Mille Lacs Band sued the United States. The Band acknowledged that the reservation no longer existed, but claimed that the consideration promised was never honored. This Court awarded some additional compensation to the Band and recognized that the reservation no longer existed. *United States v. Mille Lacs Band of Chippewa Indians*, 229 U.S. 498, 507-508 (1913). In spite of this venerable 1913 decision, the Mille Lacs Band maintains that the original reservation still exists.

The Band has acted upon their position and continued to pursue recognition of the 1855 reservation boundaries on several fronts. As a result, Mille Lacs County filed a declaratory judgment action in federal district court. The federal district court concluded that a case or controversy was not present. *County of Mille Lacs v. Benjamin*, 262 F.Supp.2d 990 (D.Minn. 2003). That issue has been submitted to the Eighth Circuit Court of Appeals. *County of Mille Lacs v. Benjamin*, Nos. 03-2527 and 03-2537 (8th Cir. argued Oct. 24, 2003).

3. Thurston County, Nebraska. Two reservations were initially established in Thurston County, Nebraska: the

Omaha Indian Reservation and the Winnebago Indian Reservation. This entire area of approximately 250,000 acres is now over seventy-five percent (75%) owned by non-Indians and substantially populated by non-Indians (approximately 50%).

One segment of the Omaha Reservation was sold in 1882. Until recently, the Bureau of Indian Affairs and the Department of the Interior agreed that that area was no longer within the limits of any Indian reservation. Despite this jurisdictional history, the issue was recently raised in *State of Nebraska v. Picotte*, Case No. CR 00-6 (Dist. Ct. Thurston County, Aug. 22, 2000). In that case, the county court and the district court concluded that this reservation area had been disestablished. *State of Nebraska v. Picotte*, Case No. FE 99-23 (Thurston County Ct. Apr. 14, 2000); *State of Nebraska v. Picotte*, Case No. CR 00-6 (Dist. Ct. Thurston County, Aug. 22, 2000). However, the Omaha Tribe has not accepted the result and continues to treat the area in question as if it were within the limits of the Omaha reservation. Significantly, the Tribe does not own any land within this area nor do any of the members of the tribe own land there or reside there.

SUMMARY OF ARGUMENT

At the outset, *Amici* Counties note their agreement with the United States that Congress did not delegate federal prosecutorial authority to the tribes under the ICRA amendments. However, *Amici* Counties support Respondent's position that the Eighth Circuit Court of Appeals correctly held that Congress lacks authority to confer retained inherent authority on Indian tribes. ("[W]e conclude that the distinction between a tribe's inherent and delegated powers is of constitutional magnitude and therefore is a matter ultimately entrusted to the Supreme Court." *United States v. Lara*, 324 F.3d 635, 639 (8th Cir. 2003) (*en banc*)). In this light, *Amici* Counties submit that the principles in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), and *Duro v. Reina*, 495 U.S. 676 (1990), control this case.

ARGUMENT

> [T]he restrictions upon the right of soil in the Indians, amount . . . to an exclusion of all competitors [to the United States] from their markets; and the limitation upon their sovereignty amounts *to the right of governing every person within their limits except themselves. Fletcher v. Peck*, 6 Cranch 87, 147 . . .

Oliphant, 435 U.S. at 209 (emphasis as in original).

I. THE ARGUMENTS OF THE UNITED STATES SHOULD BE REJECTED.

The United States has consistently supported expanding tribal jurisdiction over non-members. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (Marshall, J., dissenting) and *Duro v. Reina*, 495 U.S. 676 (1990) (Brennan, J., dissenting). The arguments of the United States were rejected in *Oliphant*, and *Duro*, as well as in a number of other related cases. *Montana v. United States*, 450 U.S. 544 (1981); *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001) and *Nevada v. Hicks*, 533 U.S. 353 (2001); *see also South Dakota v. Bourland*, 508 U.S. 676, 697 (1993) (noting the "Government's litigating position"). Once again, the United States has submitted arguments in this case that are strikingly similar. *See* Motion for Leave to File Brief Out of Time and Brief of the States of New Mexico, South Dakota and Washington as *Amici Curiae* in Support of Petitioner, *Duro v. Reina*, 495 U.S. 676 (1990) (No. 88-6546).

Once again, however, the bright line painstakingly established by this Court in protecting the constitutional rights of non-members in *Oliphant* and *Duro* should be confirmed, and any effort by Congress to undermine those rights is beyond the scope of Congress' authority. *See also United States v. Wheeler*, 435 U.S. 313 (1978); *Santa Clara*

Pueblo v. Martinez, 436 U.S. 49 (1978); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

In this Court, the arguments of the United States generally track the arguments the United States recently submitted in the Eighth Circuit Court of Appeals and in the Ninth Circuit Court of Appeals. The United States was ultimately successful in convincing the latter court in *United States v. Enas*, 255 F.3d 662 (2001), to adopt the position of the United States (as in the past). The judges on the Ninth Circuit's *en banc* panel nevertheless differed in their approach to the issue raised here. *Enas*, 255 F.3d 662, 675 (2001) (Pregerson, J., concurring). In addition, even the opinion of Judge McKeown made clear that the panel majority, unlike the United States, thought it would be "disingenuous to suggest that this question presents a simple answer." *Enas*, 255 F.3d at 674. *Amici* agree that the answer is not simple.

At the end of the day, *Amici* Counties submit that the Eighth Circuit Court of Appeals has the better argument with reference to the validity of the ICRA amendments. As Judge Wollman reasoned in the vacated panel opinion in *United States v. Weaselhead*, 156 F.3d 818 (8th Cir. 1998):

> These post-*Duro* amendments reflect an attempt by Congress to rewrite the fundamental principles upon which *Duro*, *Oliphant*, and *Wheeler* were based by redefining the Indian tribes' "inherent" sovereign status as having always included criminal jurisdiction over nonmember Indians. Thus, we are presented with a legislative enactment purporting to recast history in a manner that alters the Supreme Court's stated understanding of the organizing principles by which the Indian tribes were incorporated into our constitutional system of government.
>
> . . . .

> We conclude that ascertainment of first principles regarding the position of Indian tribes within our constitutional structure of government is a matter ultimately entrusted to the Court and thus beyond the scope of Congress's authority to alter retroactively by legislative fiat. Fundamental, *ab initio* matters of constitutional history should not be committed to "[s]hifting legislative majorities" free to arbitrarily interpret and reorder the organic law as public sentiment veers in one direction or another.

Id. at 823-824. The dissenting opinion in the three-judge panel below found this *Weaselhead* opinion set out the correct analysis. *United States v. Lara*, No. 01-3695 (8th Cir., June 24, 2002) (Hansen, J., dissenting); *see also Means v. Northern Cheyenne Tribal Court*, 154 F.3d 941, 946 (9th Cir. 1998).

In this respect, *Amici* would conclude this argument as Mr. Justice Stewart did in oral argument in *Oliphant*, with what is necessary to decide in this case and what is not. Transcript of Oral Argument at 29, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (No. 76-5729). Here, as in *Oliphant* and *Duro*, we submit the question is whether or not Indian tribes now have the criminal jurisdiction as claimed by the United States. The question is not, if they do not, who does? This Court rejected the jurisdictional void policy argument of the United States in those cases and it should be rejected here.

II. THE ICRA AMENDMENTS CONSTITUTE PRECEDENT FOR ADDITIONAL PROPOSED LEGISLATION THAT WOULD UNDERMINE THE CONSTITUTIONAL RIGHTS OF ALL NON-MEMBERS, INCLUDING NON-INDIANS

In 2003, Senate Bill 578 and House Bill 2242 were introduced in the Congress of the United States as amendments to the Homeland Security Act. Senate Bill 578, is entitled "Tribal Government Amendments to the Homeland

Security Act of 2002." It was introduced in the Senate of the United States by Senator Daniel K. Inouye. It is colloquially referred to as the "Hicks Fix" (referring to *Nevada v. Hicks*, 533 U.S. 353 (2001)).

Section 13 of the bill "affirms and declares that the inherent sovereign authority of an Indian tribal government includes the authority to enforce and adjudicate violations of applicable criminal, civil and regulatory laws committed by any person on land under the jurisdiction of the Indian tribal government, except as expressly and clearly limited by" a treaty or an Act of Congress. Section 13 of said bill further proposes that

> The authority of an Indian tribal government described in [the Bill] shall (1) be concurrent with the authority of the United States; and (2) extend to (A) all places and persons within the Indian country (as defined in Section 1151 of title 18, United States Code) under the concurrent jurisdiction of the United States and the Indian tribal government; and (B) any person, activity, or event having sufficient contacts with that land, or with a member of the Indian tribal government, to ensure protection of due process rights.

S. 578, 108th Cong. § 13 (2003).

To date, Congress has not acted on these bills. The manner in which this Court resolves the present case will undoubtedly be considered in that process. Again, this Court should continue to adhere to the bright line established in *Oliphant* and *Duro*.

Along these lines, *Amici* Counties also agree with the Brief *Amicus Curiae* of the States of Idaho, et al. that the two other constitutional issues regarding whether Congress may subject citizens to the criminal jurisdiction of extra constitutional entities not bound by the Constitution, and whether the ICRA amendments discriminate on the base of ancestry or race, were not raised by Respondent and are inappropriate for

consideration in this matter. As *amicus curiae* Idaho has observed, Respondent has no interest in the ICRA amendments being declared unconstitutional; his double jeopardy claim instead can succeed only if they are construed as a delegation of federal authority. Brief *Amicus Curiae* of the States of Idaho, et al. at 18, n. 6.

CONCLUSION

The judgment of the Court of Appeals should be affirmed to the extent that it rejected the arguments of the United States that the amendments to the Indian Civil Rights Act of 1968, 25 U.S.C. 1301, effected a retroactive legislative reversal of *Duro v. Reina*, 495 U.S. 676 (1990).

Respectfully submitted,

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